

MASSACHUSETTS BAR EXAMINATION

SECOND DAY

FEBRUARY 24, 2005  
MORNING PAPER  
(9:00 A.M. TO 12:00 NOON)  
QUESTIONS

ESSAY SECTION

1. You were the lawyer for Titan, a manufacturer of automobiles. It was incorporated in and its principal place of business was in Ohio, with a manufacturing plant in Massachusetts. It was sued in a Massachusetts state court by Pan, a resident of California, for severe injuries from an accident in Massachusetts resulting from the alleged negligent manufacture of Pan's automobile. The alleged negligence was based upon the fact that a wheel came off as a result of defective wheel lugs. Pan also sued, as a defendant in the case, Lugg Co. a manufacturer of wheel lugs, which, for the first time, sold wheel lugs to Titan six months after the manufacture of Pan's automobile. You gave written notice, and corroborating documents, to Pan's attorney concerning the date of manufacture of the automobile and the fact that Lugg Co. was not the wheel lugs supplier involved.

- (1) Titan wanted the case removed to and kept in the federal district court in Boston. You removed it. Pan sought to have it remanded. How should the court have ruled?

Depending upon whether the case was removed to the federal district court and was kept there or was remanded to the state court in accordance with your answer to question 1 above, answer the following questions:

- (2) Pan's attorney wanted to depose the expert you retained to testify concerning the alleged negligence. You have refused to produce the expert. How should the Court have ruled?

- (3) You wanted to depose Pan in your office in Boston and his counsel contended that you must go to California to do so. How should the court have ruled?
- (4) Pan's counsel hired a detective to interview the former manager of Titan's engineering department, a person who was angry at Titan because he had been fired. You filed a motion to enjoin the proposed interview. How should the court have ruled?
- (5) Pan filed a motion to have Titan produce your file made by you in preparation for the case. Titan wanted you to produce it. What should you have done?

2. Mary and Bill, husband and wife, wanted to buy a two-family house in Anytown, MA, where they both worked. Through a real estate agent, Anne, they learned that Dick owned a fully rented two-family house which was for sale through Anne's company. Mary and Bill liked the house, but wanted "to think about it for a while." Anne then had them sign a pre-printed form labeled "Offer to Purchase" ("OTP") dated April 6, 2004, which described the property, stated the price that Mary and Bill were offering, \$200,000, and set the time and place of the closing as 11:00 a.m., May 10, 2004, at the County Registry of Deeds. The OTP also contained the following sentence: "The parties shall execute a complete Purchase and Sale Agreement within 10 days of the signing of this Offer to Purchase by Mary and Bill." Anne sent the OTP to Dick.

Two weeks later, Mary and Bill told Anne that they wanted to buy the house. Anne told Dick, who asked her to confirm with Mary and Bill that the closing of the sale would be at the County Registry of Deeds on May 10, 2004. Anne so informed Mary and Bill by e-mail. No purchase and sale agreement was ever signed.

One May 9, the day before the closing, the following events occurred:

- (1) Mary told Bill that she was leaving him, and would not be buying the house with him.
- (2) Dick informed the Tenants residing in the house under written leases that, if he sold the house, they would have to vacate the premises at once. The Tenants said that their leases ran for several more months and contained no provision for termination-upon-sale.
- (3) Dick entered into a formal Purchase and Sale Agreement for the house with Paul, at a price of \$300,000.

- (4) The Anytown Savings Bank filed with the County Registry of Deeds a Notice of Foreclosure of a mortgage on Dick's property for non-payment of the monthly mortgage amount.

On May 10, Bill went to the Registry of Deeds at 11:00 a.m.. He brought with him a certified check for \$200,000, payable to Dick, drawn on a joint bank checking account he held with Mary, which held money that came only from deposits by Mary. Dick did not appear.

What are the rights of Mary, Bill, Dick, Paul, Tenants and Savings Bank?

3. Shady Siding Corporation, a Maine corporation, with no place of business in Massachusetts, sold aluminum siding for buildings. Last year, Sam, a salesperson employed by Shady, came to Massachusetts to market Shady's product to home and business owners. In early October, 2004, Sam went door-to-door in Smalltown, Massachusetts, and told each prospective purchaser the following:

- (1) that the clapboard or shingles on their houses or commercial buildings were rotting;
- (2) that, if the owner would give him a check for \$10,000, payable to Shady, the company would install the highest quality aluminum siding on the building, in a color of the purchaser's choice, within 30 days; and
- (3) that the \$10,000 price was half the usual sales and installation price.

None of Sam's statements to prospective buyers was true.

Three property owners accepted Sam's offer: (1) Teresa owned a small commercial property; (2) Victor and (3) Walter owned single family houses. Each gave Sam checks payable to Shady for \$10,000. No written agreements were made. Each buyer specified dark brown as the color of the siding. Shady deposited the three checks; Teresa's and Victor's checks cleared, but Walter's was returned for insufficient funds.

In early January, 2005, Shady employees showed up at each property and installed low-grade, hot pink aluminum siding on each building. Victor protested the installation, but the Shady employees completed the job. Teresa and Walter were not present when the work was done. Shady has sued Walter for payment in a Maine State Court.

What are the rights of Teresa, Victor, Walter and Shady?

4. Art, Ben, and Chum, members of the State U. football team, were out celebrating a victory at a local bar where they met Mary, also a student at State U. and the daughter of a generous State U. donor and alumnus. After a night of heavy drinking Art, Ben and Chum returned to their dormitory room with Mary, allegedly to eat pizza and watch a movie. Art, Ben and Chum had talked about using Mary to get some money from her wealthy father. Despite their repeated demands for Mary to call her father with a ransom demand Mary said, “No” but didn’t try to leave their room. Art had a previous social relationship with Mary but that had ended.

Art, who was quite drunk, said “I don’t care what she says, we’ll force her to call. Are you with me?” Ben nodded his head “yes”. Chum said nothing. Then Mary said she wanted to go home, but Art locked the door so Mary could not leave. Art then shouted, “You’re going to help us get some money or you’ll regret it!”

Then, Ben said, “This is crazy. What are we doing? Let’s stop this now!” Then Ben left the room and Mary remained with Art and Chum.

Art did not let Mary leave, and he continued to threaten her if she didn’t call her father. Then Chum, also very drunk, threatened to hurt Mary if she didn’t cooperate.

Art then threatened Mary with a knife, and she started screaming. Art tried to make Mary stop, and he choked her to death. Chum watched but did nothing.

Then Art and Chum went into Ben’s room, and told him what happened. Ben told Art and Chum to stay with him for the night. The next morning Mary’s body was found and Art, Ben, and Chum were arrested.

What crimes have Art, Ben and Chum committed, if any?

5. Joe was driving his car to work when he was struck by a truck and injured. The truck was owned by Corporation and operated by Frank, an employee of Corporation. Joe sued Corporation and Frank (the “Defendants”) in the Superior Court alleging that the Defendants were negligent.

At trial, the parties sought to introduce the following evidence:

- (1) **By Defendants**, a written report, prepared and signed by Doctor, a physician who stated that he had not personally examined or treated Joe but had reviewed Joe’s hospital and medical records, and that it was his expert opinion that Joe’s injuries were not proximately caused by the accident.
- (2) **By Defendants**, a copy of a letter that Joe had written to his employer the week after the accident in which Joe stated that he had had too many beers on the day of the accident.
- (3) **By Joe**, a portion of the police report which contained a statement by Mary, a pedestrian who had observed the accident, that in her opinion Joe had not been exceeding the posted speed limit.
- (4) **By Joe**, a statement by Frank to an insurance investigator that he had run a red light just before his truck hit Joe.
- (5) **By Defendants**, Joe’s criminal record of convictions for (1) assault and battery six years ago, a misdemeanor for which he was fined \$500.00, and (2) forgery eleven years ago, a felony for which he served one year in prison.
- (6) **By Defendants**, a witness, John, who knows Joe from their health club and would testify that Joe has a reputation among members of the health club for untruthfulness.

- (7) **By Joe**, a handwritten diary prepared by Joe's wife, now deceased, which described in detail the pain and discomfort Joe had suffered from the accident and which included conversations between Joe and his wife.

The respective parties have objected to the admissibility of the Evidence. How should the trial judge rule?



MASSACHUSETTS BAR EXAMINATION

SECOND DAY

FEBRUARY 24, 2005  
AFTERNOON PAPER  
(2:00 P.M. TO 5:00 P.M.)  
QUESTIONS

ESSAY SECTION

6. Trac, who claimed to receive visions codifying proper moral conduct, attracted about 100 persons whom he and they called "Trac's Followers." They prayed together and referred to their code of moral conduct as their religion. They met for prayers in various resorts rented by Trac monthly for "retreats." Trac charged and collected a substantial fee at each retreat.

It was an established custom among the followers that any dispute among them or with Trac, arising out of their relationship, was judged by Trac and any two other followers selected by him. That adjudication was called "The Trac religious court."

Trac accused Jones, a follower, of stealing gold religious objects at a retreat. He convened a religious court in the accustomed fashion. The court wrote a judgment that "Jones is a thief. He stole valuable gold religious objects belonging to Trac's Followers." As punishment, the judgment was that Jones was to be excluded from all retreats until he paid to Trac a fine of \$5,000.00.

The written judgment was carried on the front page of the newspaper in Jones' home town, as an advertisement paid for by Trac.

Jones filed a complaint in state court seeking money damages.

What are his rights?

7. Husband and Wife were married in 1975 and lived in Massachusetts. Wife, who was several years younger than Husband, was a high school graduate, while Husband had a college degree. During their marriage they had two children, and Wife was a homemaker who was primarily responsible for the upbringing of the children, while Husband provided the family's support as an employee of Acme Corp., a major manufacturing company.

In 2000, after both children had graduated from college, Wife learned that Husband was having an affair with his secretary at Acme Corp. Wife left Husband, taking with her nothing other than a suitcase of clothing, and moved to another state where, after establishing a legal domicile, she obtained a valid divorce the following year. The judgment of divorce contained no provision for the division of marital property.

At the time of the divorce, Husband and Wife owned a residence in Massachusetts. Husband owned stock in Acme Corp., where he had advanced to a high-level executive position. Husband also was named as sole beneficiary under the will of his mother, who was then living.

After the divorce, Wife started a small mail-order business, which by 2002 had grown into a highly successful internet company. In 2003, Husband was laid off as a result of a downturn in business at Acme Corp., and he retired on a pension which was substantially less than he had earned as an employee. That same year, Husband's mother died and he received a large inheritance under her will.

Husband has continued to reside in the residence owned by Husband and Wife. It has nearly doubled in value since the time of the divorce as the result of an inflated real estate market and improvements made by Husband since the time of the divorce. The stock in Acme Corp., which Husband owned at the time of the divorce, as well as additional stock he acquired as a part of his compensation since the time of the divorce and until his retirement, has declined in value.

In December of 2004, Wife sold her business for a large profit and returned to Massachusetts to be near her children. She has filed a complaint in the Probate and Family Court for an assignment or division of the marital property of Husband and Wife. Husband has counterclaimed.

What are the rights of the parties?

8. James and Barbara were married ten years ago. At the time of their marriage, James had two adult children from a prior marriage, a son, Stephen, and a daughter, Denise, from whom he was then estranged. Barbara had never been married before and had no children.

In 2000, James duly executed his will, which provided as follows:

Article I. *I give my 1000 shares of Corporation stock and my savings account at First Bank to my wife, Barbara, if she survives me, otherwise to my business partner, Peter.*

Article II. *I give \$1.00 to my daughter, Denise.*

Article III. *I give the rest, residue and remainder of my estate to my wife, Barbara, if she survives me, otherwise to my son, Stephen.*

Article IV. *I nominate Peter as executor of my will.*

In 2001, James's shares in Corporation split 2 for 1 and as a result, his holdings increased to 2000 shares. In addition, that same year, James withdrew all of his savings from his savings account at First Bank and deposited them in Second Bank, where interest rates were higher. In 2002, James reconciled with his daughter, Denise. Thereafter, telling no one, James crossed out Peter's name in Article I of his will and wrote in Denise's name instead. In 2003, Stephen died, survived by his wife and two children. Stephen's will left his entire estate to his wife.

Last month, James and Barbara both were killed instantly in a car accident caused by the negligence of Speeder. At the time of their deaths, James and Barbara owned their home as tenants by the entirety. James owned his 2000 shares of Corporation stock and his savings account at Second Bank. He also had a life insurance policy which named Barbara as its only beneficiary. Barbara, who died without a will survived only by her sister, Carol, and her niece, Nancy, the daughter of a brother who had died several years earlier, had her own separate

savings account at Third Bank. No claims arising out of the accident have been made against Speeder.

Peter has consulted you regarding his rights and those of the other parties. What will you advise him?

9. Guru, a Massachusetts company, had a written agreement with NetCan, a software developer, to buy and then resell NetCan's products to Guru's own customers. The agreement contained the following language: "NetCan promises state of the art software and a full money back guarantee if NetCan's software is in any way defective." NetCan's software contained a so-called "clickwrap" license agreement which required the end-user to click on a box signifying agreement with NetCan's license terms before installing the software. The NetCan license contained a provision limiting its liability and asserting that the software was unique when installed and used properly.

NetCan software was Guru's most popular product. About a year after the agreement was signed, NetCan came out with an enhanced version. Almost all of Guru's customers requested the upgraded version of NetCan which required sophisticated technical expertise to install. NetCan was willing and able to supply as many updated versions as Guru wanted but insisted upon charging a fee for the enhanced version as well as a technical fee for assistance in installing the updated software.

When Guru responded that NetCan's refusal to provide the upgrades and the imposition of an upgrade installation fee violated their written agreement, NetCan claimed that its clickwrap license agreement did not require it to provide perpetual upgrades and technical support to its users. Guru sued NetCan and, while the lawsuit was pending, Guru informed its customers that it would provide the enhanced version at no charge but that it would be necessary for users to pay the additional fees for installation assistance.

Carla, a Guru customer and a graduate student, obtained the free upgrade in disc form and left it on her desk. Before she could decide whether to pay the installation assistance fee,

Frank, a friend, found the disc and installed the software incorrectly, causing Carla's computer to malfunction and destroying the only draft of her thesis.

What are the rights and obligations of the parties?

10. A group of college friends including Ace, Bert and Coco formed Massachusetts Beverage Supply Partnership (BSP). Dale, another college friend who was a lawyer, provided a written agreement which everyone signed. Ace became BSP's sole general partner and the remaining friends, except Dale, became limited partners.

Despite the growing demand for BSP's products, BSP failed to show a profit during its first three years and no distributions were made to BSP's partners. Bert and Coco felt that Ace was either a poor manager or was stealing from the company and wanted to force Ace to follow their instructions regarding BSP's day to day operations.

Bert and Coco agreed that Coco would meet with Ace to discuss the situation. During the meeting, Coco demanded that Ace provide BSP's current financial records along with BSP's limited partnership records. Ace refused, saying that he was going to run the business the way he wanted regardless of what the other partners thought. He declined to answer any of Coco's questions or to allow her to examine the partnership records on site at BSP's offices.

Coco told Bert about her conversation with Ace. Bert decided that his investment was at risk if Ace remained BSP's general partner and immediately sold his interest in the limited partnership to Sam. When Coco told Ace that Sam was now a BSP limited partner, Ace responded that he hated Sam, that he had not approved of the sale of any interest in BSP and that Sam had no rights in BSP and was not a partner.

Coco and Bert went to Dale for advice. Although Dale knew that Ace was trying to recoup his gambling losses by selling alcoholic beverages to local fraternity houses, she said nothing to Bert and Coco because Ace had been giving her cases of wine in addition to the payment of her legal bills.

What are the rights of the parties?